No. 93-860

JAN 27 1994
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHIRLEY IVY, Individually and as Representative of the Estate of Donald Ivy, Deceased; CHARLES JARDON and TONY K. JARDON, individually and as Next Friend of Charles Jardon, Jr.; ROBIN JARDON, WARREN JARDON and SHARON JARDON; VERDA WILSON, Individually and as Representative of the Estate of Isaiah Wilson, Jr., Deceased; SHIRLEY ZALEWASKI, Individually and as Representative of the Estate of Yen Zalewaski, Deceased; GARY THOMAS, MARY LEE THOMAS; JAMES L. KENT; EMMA I. KENT; DAWN MARIE INMAN, Individually and as Representative of the Estate of Bobby Joe Inman, Deceased; JAMES DONALD DELOATCH; JOYCE DELOATCH; URSULA MARGOT PARRY, Individually and as Representative of the Estate of James D. Parry, Sr., Deceased; JAMES D. PARRY, JR.; JAMES C. PARRY,

Petitioners,

VS.

DIAMOND SHAMROCK CHEMICALS COMPANY; DOW CHEMICAL COMPANY; MONSANTO COMPANY; UNIROYAL, INC.; HERCULES, INC.; THOMPSON-HAYWARD CHEMICAL COMPANY; T.H. AGRICULTURE & NUTRITION COMPANY, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* THE STATES OF MISSOURI, NEVADA, OREGON, SOUTH CAROLINA, WASHINGTON AND THE COMMONWEALTH OF PUERTO RICO

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STATEMENT OF INTEREST

The States of Missouri, South Carolina, Washington, Oregon, Nevada and the Commonwealth of Puerto Rico file this brief *amicus curiae* to request this Court to grant the petition for a writ of certiorari in the case of *Ivy et al. v. Diamond Shamrock et al.*, No. 93-860 in order to protect their sovereign rights to maintain an effective judicial system and to enforce their laws.

We, the aforementioned States and Commonwealth, adopt without reservation the arguments and conclusion of the State of Texas, forty four other States and the District of Columbia in their brief *amicus curiae* previously submitted to this Court, and add to them the following reasons.

SUMMARY OF THE ARGUMENT

Former United States Marine Corps Captain Donald Ivy died in 1988, the year after he was diagnosed with cancer. Upon Captain Ivy's death, his wife brought suit, based on Texas state law claims, in the District Court of Orange County, Texas. The suit alleged that exposure to Agent Orange during service in Vietnam caused Captain Ivy's death. The District Court of Orange County had the right and authority to decide whether Captain Ivy's suit was barred by the 1985 *In re Agent Orange* class action settlement in Brooklyn federal court, a settlement entered three years before Ivy's cancer was diagnosed.

ARGUMENT

The individual States have the unquestionable right to provide their citizens with legal recourse for state claims through access to state courts. Article III federal courts, deriving their authority solely from the Constitution and statute, are courts of limited jurisdiction. They have no power to divest state courts of their jurisdiction unless that power has been granted to them. The All Writs Act, 28 U.S.C. §1651(a), conferred no such power or authority on the district court in the Eastern District of New

York in this case because the district court lacked jurisdiction over the Texas plaintiffs in this case.

The decision of the Second Circuit has countenanced the exercise of apparently boundless federal judicial power where none exists as a means to reach an unconstitutional end, the end being the extinction of causes of action before they were known to exist or became justiciable. In so doing, the court permitted form to neutralize substantive rights.

The class action is merely a procedural device under the Federal Rules of Civil Procedure to adjudicate substantive claims. As a procedural form of action under the Federal Rules, it creates no substantive rights nor may it "abridge, enlarge, nor modify the substantial rights of any litigant," precisely what has occurred here. Rules Enabling Act of 1934, Act of June 19, 1934, ch. 651, §§ 1, 2, 48 Stat. 1064; *see also Provident Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968).

Although veterans yet-to-manifest-injury were neither parties to, nor separately represented in, the original *In re Agent Orange* litigation, the Second Circuit concluded that settlement of that case decided their rights.[1] The right to due process would be hollow indeed if the right of Vietnam veterans and their survivors to seek redress in state court could be bargained away by others before the veterans and the scientific community knew that they had some interest in the bargain then being struck.

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[1] The *In re Agent Orange* complaint identified as and limited the plaintiffs to those veterans exposed to Agent Orange who were "thereby caused to suffer severe and permanent disabling injuries, diseases, physical disorders and disfigurement, and in some cases, death." Pet. Br. 5. After opt-out date the settlement agreement purported to enlarge the class to include "those persons who have not yet manifested injury." *In re Agent Orange*, 597 F.Supp. 740, 865 (E.D.N.Y. 1984). Whether such persons were not bound by the terms of the settlement agreement because they were not parties to the action, was an issue which the District Court of Orange County should have decided. *See, e.g., Martin v. Wilks*, 490 U.S. 755, 761 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); *see also Shields v. Barrow*, 17 How. 130, 139 (1854); *Mallow v. Hinde*, 12 Wheat. 193, 198 (1827).

The Second Circuit decision affects equally the rights of the States and their citizens. The court below legitimized a virtually limitless federal power of judicial intervention as a means of preventing Vietnam veterans from exercising state protected rights in state court. The interest of the States in the exercise of their own judicial power is thus at stake.

The Second Circuit dismissal of unmatured state claims also interferes with the right of the States to exercise legislative power which is clearly theirs and which some already have exercised with respect to Agent Orange. State laws are interlaced with enactments which furnish Vietnam veterans and their families with specific assistance and remedies for exposure to and injury from Agent Orange, wholly apart from what the federal government may have done, and in addition to other state statutory and common law remedies. For example, some States have enacted special Agent Orange statutes of limitations which begin to run two[2] or three[3] years from the date of discovery of Agent Orange injury, or from the date that a veteran or his survivor has been informed by a physician or competent medical

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[2] The West Virginia statute requires commencement of an action for personal injury "caused by contact with or exposure to chemical defoliants or herbicides, including agent orange . . . within two years from the date of discovery of such injury, or within two years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later." W.Va. Code §16-28-10 (1983). The New York statute provides for the commencement of such an action " . . within two years from discovery of such injury, or within two years from the date when through the exercise of due diligence the cause of such injury should have been discovered, whichever is later." N.Y. *Civil Practice Law and Rules* §214-b (McKinney's 1982).

[3] The Rhode Island statute provides: "Notwithstanding any provision of law to the contrary, an action to recover damages for personal injury caused by contact with or exposure to phenoxy herbicides while serving as a member of the Armed Forces of the United States in Indo-China . . . may be commenced within three (3) years from the date of the discovery of such inquiry, or within three (3) years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later." R.I. GEN. LAWS §9-1-14.2 (1985).

authority that he (or she) ". . . has been injured. . ."[4] or that ". . . injuries or death may be related. . ."[5] to Agent Orange. Other States have enacted statutes giving the State attorney general, on behalf of Vietnam veterans, the right to bring a class action to secure release of information with respect to [exposure] to Agent Orange.[6] Some have established registries to assess the effects of Agent Orange[7] and to provide medical and medical referral services.[8] A number exclude payments received for Agent Orange injury, including that received from suits against Agent Orange "manufacturers or distributors,"[9] from income calculations for tax purposes, benefits entitlement and employment preferences[10].

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[4] The Ohio statute reads as follows: ". . . a cause of action for bodily injury incurred by a veteran through exposure to chemical defoliants or herbicides or other causative agents, including agent orange, arise upon the date on which the plaintiff is informed by competent medical authority that he has been injured by such exposure . . .". OHIO REV. CODE ANN. §2305.10 (1982).

[5] The Delaware statute reads: "Notwithstanding any other provision of law to the contrary, the time limitation for an action to recover damages for wrongful death or for personal injuries suffered by a member of the armed forces of the United States . . . due to exposure to phenoxy herbicides, including but not limited to exposure to substances known as Agent Orange . . . shall not expire until two years has elapsed from the date said person has been told by a licensed physician . . . that his (or her) injuries or death may be related, in whole or in part, to exposure to phenoxy herbicides." DEL. CODE ANN. tit. 10 §8131 (1983).

[6] HAW. REV. STAT. §321-267 (1982); OKLA. STAT. tit. 72 §355 (1982); OR. REV. STAT. §408.335 (1991); MICH. COMP. LAWS §333.5725 (1987); TEX. CODE ANN. *Health & Safety* §83.007 (1989); W.VA. CODE §16-28-6 (1983).

[7] HAW. REV. STAT. 321-264 (1982); LA. 29:301, 303 (1986); MINN. STAT. §196.26 (1982); OKLA. STAT. tit. 72 §358 (1982); S.C. CODE ANN. §(1986); VA. CODE ANN. §2.1-740 (1988).

[8] GA. CODE ANN. §31-30-7 (1982); OKLA. STAT. tit. 72 §356 (1982).

[9] IOWA CODE ANN. §422.7(20).

[10] MICH. COMP. LAWS §35.1072 (1990); MO. REV. STAT. §208.012 (1990); N.J. REV. STAT. §44:8-128 (1986); N.Y. *Military Law* §235-a (McKinney's 1993).

This enumeration of state action in the field is not intended to be all inclusive. However, it does show state legislatures looking forward to the day when science might be able to establish a firm causal connection between Agent Orange and injury to veterans. With the report of the prestigious National Academy of Sciences linking Agent Orange to certain specific medical conditions, that day may be at hand and may lead to further State legislation unless foreclosed by the Second Circuit opinion.

On July 28, 1993, one month prior to the Second Circuit's final decision in this case (A63), the Institute of Medicine of the National Academy of Sciences ("NAS") issued its report, thereby concluding an exhaustive one-year study and evaluation of the available scientific and medical information regarding the health effects of exposure to Agent Orange, other herbicides and the contaminant dioxin used in the Vietnam conflict.[11] The NAS report found sufficient evidence of a positive association between Agent Orange and soft tissue sarcoma, non-Hodgkins lymphoma, Hodgkins disease, chloracne and pophyra cutanea tarda (a blistering condition of the skin). National Academy of Sciences Institute of Medicine, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam*, 572, 678, 682 (1993). The NAS report also found limited/suggestive evidence of a positive association between Agent Orange and respiratory cancers (lung, larynx, trachea), prostate cancer and multiple myeloma. *Id.* at 574.[12] The Second Circuit's conclusion that ". . . despite continuing research, the crucial issue of 'general causation' . . . remains unsettled (A20)," is clearly wrong in view of the NAS' scientific findings of causation in fact.

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[11] The report followed a Congressional directive in Public Law 102-4 signed on February 6, 1991 that the Secretary of Veterans Affairs request the NAS to undertake the study.

[12] The report, based only on existing research, was unable to determine the presence or absence of an positive association between exposure to herbicides and the following health outcomes: seven other types of cancer, spontaneous abortion, birth defects, childhood cancer in offspring and neo/natal death and stillbirths. *Id.* at 577, 591-634. The rights of offspring of veterans exposed to Agent Orange are apparently not at issue in the *Ivy* case.

Thus, the Second Circuit's decision clearly implicates, if not threatens, the right of the States to enact legislation in the interest of their citizen-Vietnam veterans. It effectively sanctions the routine use of the All Writs Act to enforce a private agreement among litigants to settle for "nuissance value"[11] the *In re Agent Orange* litigation against those veterans who were not parties to the agreement. The Second Circuit decision has preempted existing or future State legislative action on Agent Orange and divested state courts of their jurisdiction to adjudicate suits brought under those and other statutes or the common law. Despite its insistence to the contrary, the Second Circuit did issue "a jurisdictional blank check which district courts may use [under the All Writs Act] whenever they deem it advisable." (A9).

Ultimately, the balance to be struck in this case is between the right of a federal court to act beyond its authority to usurp the jurisdiction of a state court in order to preserve a settlement beyond its jurisdiction to enforce, and the right of state courts and legislatures to act within their authority in furtherance of the due process rights of their citizens. Our constitutional system of checks and balances makes no provision for the issuance of "blank checks" to the federal courts. Surely, principles of federalism require the balance to be struck in favor of the proper exercise of state judicial power, rather than the perversion of federal judicial power.

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[11] The Second Circuit characterized it as such. *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145, 171 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

CONCLUSION

Fundamental principles of federalism warrant the granting of the Petition for a Writ of Certiorari requested by Mrs. Ivy.

Respectfully submitted,

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